IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

16.03.18 — DATE

SIGNATURE

CASE NUMBER: A90/16

DATE: 16 February 2018

MANDLA SIBEKO — Appellant

V

THE STATE — Respondent

JUDGMENT

MABUSE J: (F Diedericks AJ concurring)

[1] This is an appeal against both conviction and sentence. The appellant was granted leave to appeal against his conviction and sentence in respect of count 1 only on petition by Makome J and Hassim AJ on 10 December 2015.

[2] The charge against the appellant in count 1 was that of possession of motor vehicle break-in implements. The allegation by the State was that on or about 30 November 2012 and at or near Nigel the appellant was found in unlawful possession of implements or objects, namely immobiliser (destructor) in respect of which there was a reasonable suspicion that it had been used or was intended to be used to commit housebreaking or to break open a motor vehicle or to gain unlawful entry into a motor vehicle and of which the appellant was unable to give a satisfactory account of such possession.

[3] The appellant, who initially had chosen to conduct his own defence, pleaded not guilty to the charge and in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the CPA"), a short explanation made in which he admitted that he was found in possession of an immobiliser in Nigel on 30 November 2012. The State called a number of witnesses, the first of whom was Captain Madodeni Zacharia Mkhabelani ("Mkhabelani") who told the court that on 30 November 2012, while he was at work, he received a call from his informer about three men who were standing at the corner of Lavers Street and Second Avenue in Nigel. He also told the court that he had been told by his informer about the activities of those three men. He called for backup and constables Skhosana and Tsitsede responded positively. He went there and at the given spot saw the three men. He went straight to them. As he approached them, he saw the appellant with the immobiliser in his hand. On noticing him, the appellant dropped the immobiliser. He approached him and asked him why he dropped the immobiliser. Before he could respond he told the appellant that he would arrest him for the possession of the immobiliser because he was in possession of an instrument that could be used to break into motor vehicles. Under cross-

examination Mkhabelani told the court that he knew an immobiliser. The only thing that still had to be done was, so he testified, to establish whether the immobiliser was still in a working condition. On a question by the court he told the court that the appellant only admitted that the immobiliser was his and that he was working with accused two and three.

[4] Constable Nicholas Skhosana ("Skhosana"), the second state witness, testified that he followed captain Mkhabelani to the scene of the arrest. While captain Mkhabelani was driving ahead of them in one motor vehicle, he and his driver followed him in another motor vehicle. At the scene he saw the immobiliser. He saw it when it was already in the possession of the captain. The evidence of Skhosana was confirmed by the evidence of constable Tsitsede.

[5] At the close of the State case, there was an application in terms of s 174 of the CPA in respect of count 1 on the grounds, firstly, that the appellant was not found in possession of anything and, furthermore, that the State had not placed sufficient evidence before court; thirdly, on the ground that the State did not prove that the device that was found in the possession of the appellant was working. According to the argument, the State had not established a *prima facie* case against the appellant.

[6] On the other hand, the State argued that there was a *prima facie* case against the appellant and that for that reason the application for the discharge of the appellant in terms of s 174 of the CPA should be refused. This argument that the device was found in the possession of the appellant was the ground upon which the State argued that there was a *prima facie* case against the appellant. The State relied on charges 2 and 3 to prove count 1.

[7] The said application in terms of s 174 of the CPA was refused. Upon such application being refused, the appellant testified. In his evidence in chief the appellant admitted that the remote

which was like a gate remote, was found in his possession. That remote was attached to his house keys. He told the court furthermore that he did not know that the remote was a destructor. This remote is also an immobiliser. He called no witness in support of his case.

[8] The court was satisfied that the appellant had committed count 1. It convicted him accordingly as charged. Upon conviction he was sentenced, in respect of count 1, to 1 year imprisonment.

[9] The appellant now appeals against both his conviction and sentence in respect of count 1 on the numerous grounds that he has fully set out in his petition for leave to appeal. It is not necessary that I set them out in this judgment. Suffice to state that the thrust of all his grounds of appeal is that the magistrate erred in making a finding that the State had proved its case beyond reasonable doubt. The court, according to the appellant, should have found otherwise and has acquitted him.

[10] There is a problem with the State case in respect of this count 1 and so with the conviction. That problem, though, does not lie with what counsel for the appellant has stated in her heads of argument. In her heads of argument counsel for the appellant stated that:

"There is no sufficient evidence to show that the remote found in possession of the appellant was a car break-in implement. There was no evidence that it was tested and that indeed it was an immobiliser destructor as alleged."

[11] In his evidence in chief, captain Mkhabelani testified that he saw the immobiliser in the hand of the appellant. Under cross-examination Ms Dlamini asked him the following question:

"Question: So sir, like you are standing here today, the reason why you were saying it is, that the remote that you were holding is actually an immobiliser is because you were informed that it is so?

Answer: *It was not because I was informed, I know the immobiliser.*

Question: *So at this point we are not sure (indistinct) ...*

Answer: *Yes, that instrument is really an immobiliser ...*

Question: *And how are we sure that it is indeed an immobiliser, sir?*

Answer: *I was holding it with my hand and I saw it."*

[12] Thereafter it was never put to the witness that the instrument that the witness had held in his hand, that the witness had seen in the possession of the appellant, that the witness had seen the appellant drop was not an immobiliser. The appellant himself never denied that he was found in the possession of an immobiliser. He called it a remote. To him they are the same. Therefore, the argument by the State produced no evidence to prove that the instrument found in the possession of the appellant was not an immobiliser lacks merit. We therefore concluded that the State had proved that the gadget was an immobiliser.

[13] The other point that was raised in the heads of argument was that the gadget was not tested. This evidence too lacks merit. This gadget was tested on 12 August 2012 at an inspection *in loco* and was found to be working. In its judgment the court *a quo* stated as follows:

"The same immobiliser destructor was later on demonstrated by warrant officer (indistinct) showing that if the use of that immobiliser destructor was to intercept the signal which would, when a car is remotely locked that that signal would be intercepted, causing such a vehicle to unlock."

In her argument counsel for the appellant contended that the evidence that the gadget was working could not be accepted because the policeman who tested it was not an expert. This argument too lacks merit. The evidence was not challenged in the court *a quo*.

[14] Secondly, the appellant himself told the police that he used it with his co-accused which means that it was working.

[15] THE RESPONDENT'S CASE

The feet of clay in the State's case lie in the following. Part of the charge is that the appellant must be unable to give a satisfactory account of his possession of the instrument. This is one of the material elements of the charge. The appellant could only be convicted of this offence as set out in count 1 if, among others, the State succeeded in proving that:

15.1 at the scene where the appellant was found in possession of the instrument he was asked by the police officer to explain the reason for his possession of the instrument;

15.2 the appellant must have failed to give an explanation or he must have given an explanation which was not satisfactory to the police officer;

15.3 the police officer must find the explanation in the circumstances to be unsatisfactory.

There is no evidence on the record that captain Mkhabelani asked the appellant to explain his possession of the instrument. Furthermore there is no evidence that he was given an opportunity to explain why he was in possession of the instrument. In the absence of such an explanation the State has failed to prove its case beyond reasonable doubt. The State has not proved all the elements of the offence and the appellant should not have been convicted. In **R v Ndhlovu 1945 AD 369** Davis AJA held that:

"In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all arguments necessary to establish guilt."

[16] The court stated the following in its judgment:

"The next question that I need to ask is Mr. Sibeko's explanation for the possession of this immobiliser destructor. Is it a satisfactory one, yes or no? As far as that is concerned, he gave an

explanation in court, that it was a key holder that he got from Themba some time ago, to put his house keys on, but he had no use for it."

Then the court made a finding on the basis of this explanation. He stated that:

"My finding is that this explanation tendered by Mr. Sibeko cannot be considered as a reasonable and satisfactory account of his possession and the court rejects this."

In my view, the court erred when it comes to an explanation or reasonable account as set out in the offence. It is not the explanation that an accused person gives in court about his possession that matters but the explanation that he gives at the scene of his arrest that is requested. The explanation that the appellant gives in court about his possession of the immobiliser is irrelevant. The explanation that is of paramount importance and whose reasonableness must be assessed by the court is the one the appellant gave at the scene of his arrest of where he was found in possession, the explanation must be given to the police officer and not to the court delving trial. This is so because an accused person, such as the appellant, must only be brought before court after he has committed an offence, i.e. the offence cannot, in the circumstances of this case, only if he has, among others, failed to give a reasonable explanation of his possession.

[17] Having regard to the order we contemplate making in this appeal, we do not intend dealing with sentence imposed on the appellant following his conviction in respect of count 1. It follows automatically that the said sentence cannot stand if the conviction is set aside.

[18] We have concluded that the appellant should not have been convicted in respect of count 1. As a consequence we hereby make the following order:

1. The appeal against both conviction and sentence of the appellant in respect of count 1 is hereby upheld.
2. The conviction of the appellant by the court a quo in respect of count 1 is hereby set aside and in its place is substituted the following:

"The accused is found not guilty and acquitted in respect of count 1."

PM MABUSE
JUDGE OF THE HIGH COURT

F DIEDERICKS
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Adv. MMP Masete*
Instructed by:	*Pretoria Justice Centre (Legal Aid Board)*
Counsel for the respondent:	*Adv. JP van der Westhuysen*
Instructed by:	*Director of Public Prosecutions*
Date heard:	*12 February 2018*
Date of Judgment:	*16 February 2018*